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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD L. COLEMAN,
SPECIALIST, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

WHETHER AMERICAN POLICE NEED NOT COMPLY WITH THE "BRIGHT LINE RULE" OF *EDWARDS V. ARIZONA*, WHEN THEY POSSESS ACTUAL KNOWLEDGE THAT AN AMERICAN SUSPECT HAS STATED TO FOREIGN OFFICIALS THAT HE INVOKED HIS RIGHT TO COUNSEL.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

RONALD L. COLEMAN,
SPECIALIST, UNITED STATES ARMY, PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Ronald L. Coleman, respectfully prayers that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 26 M.J. 451 (C.M.A. 1988) (Appendix A). The opinion of the Army Court of Military Review appears at 25 M.J. 679 (A.C.M.R. 1987) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1988, affirming petitioner's conviction dated October 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States provides:

> Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

On the morning of July 29, 1986, Special Agent (SA) Michele Herron, a United States Army criminal investigator, was called to petitioner's residence in Kaiserslautern, Federal Republic of Germany, to investigate the death of petitioner's infant daughter (R. 28). Agent Herron arrived at petitioner's home accompanied by an interpreter, a German policeman, and SA Joseph Herron, her husband (R. 29-30).

American investigators immediately and actively participated in collecting evidence at the scene. Agent Michele Herron directed the German investigator to seize certain items (R. 30, 40-42; App. Exh. X), and she photographed the suspected crime scene (R. 30). Agent Joseph Herron questioned petitioner and petitioner's wife about the general circumstances surrounding the death (R. 58). The interpreter, a United States Army employee, took custody of the evidence seized by the German police, and brought it to the autopsy held the next day (R. 31, 54-55, 59).

At 9:00 a.m. on July 30, 1986, a sergeant from petitioner's unit escorted him and his wife to a German police station (App. Exh. X). Before his arrival at the station, SA Michele Herron told petitioner that the Army was conducting a joint investigation with the Germans. *United States v. Coleman*, 25 M.J. 679, 683 (A.C.M.R. 1987); App. Exh. XIII, p.2. During a pretrial hearing, she continued to characterize the investigation

as "joint" (R. 40), and her perception that the investigations were separate developed only after the case was brought to trial (R. 40, 44). By 10:00 a.m., petitioner was apparently told he was not free to leave (App. Exh. XIII). While in custody at the German police station, a member of petitioner's unit brought him lunch (App. Exh. X).

An autopsy was conducted by German and American pathologists during the morning of July 30, 1986 (25 M.J. at 683; R. 31). Both German and American investigators attended the autopsy (R. 32, 46). Petitioner was confronted with autopsy results at 1:00 p.m. and was questioned until 3:30 p.m. At that time, petitioner told the German police he would make no further statements and that he wanted a lawyer (R. 25; App. Exh. XI). This was reduced to writing and the interrogation was terminated.

Petitioner was released to American custody and transported to an American police station (R. 66). Petitioner was again questioned at 5:05 p.m. by SA Joseph Herron (R. 60). Agent Herron was aware that petitioner had requested an attorney (R. 64), and that none had been provided (R. 66). Members of the Army's Criminal Investigation Command had previously contacted an American prosecutor to ask whether petitioner could be questioned (R. 66, 77). When questioned by SA Herron, appellant executed a written rights waiver, and made an inculpatory statement (R. 62). At trial, petitioner's motion to suppress this statement was denied (R. 100-10). Based upon his confession and the autopsy evidence, he was convicted, *inter alia*, of murder.

The constitutional question in this case was fully litigated at trial and at every stage of the appellate process. The issue granted by the Court of Military Appeals,

as a prerequisite to the Court's jurisdiction, was as follows:

> WHETHER CUSTODIAL INTERROGATION OF APPELLANT VIOLATED *EDWARDS v. ARIZONA* WHEN HIS INTERROGATOR HAD ACTUAL KNOWLEDGE THAT AN ATTORNEY HAD BEEN REQUESTED AND NO ATTORNEY HAD BEEN PROVIDED.

REASONS FOR GRANTING THE WRIT

The court below has created a rule which is violative of the "bright line" rule of *Edwards v. Arizona* that police may not initiate interrogation of a suspect who has requested counsel. The lower court has carved out a broad exception to *Edwards,* a so-called "overseas exception." The "overseas exception" violates the safeguards addressed by this Court in *Arizona v. Roberson,* __ U.S. __, 108 S.Ct. 2093, 2101 (1988), where the Court stated:

> The simple answer is that the suspect, having requested counsel, can determine how to deal with separate investigations with counsel's advice.

Petitioner submits that the issue presented is one of a recurring nature in military practice, potentially involving personnel of all the military services stationed overseas, and presents the substantial question of whether the "simple answer" of *Arizona v. Roberson* applies in the overseas setting.

I. WHEN U.S. POLICE HAVE ACTUAL KNOWLEDGE THAT A SUSPECT HAS REQUESTED COUNSEL, WITH THE EXPECTATION THE REQUEST WOULD BE HONORED, THE INVOLVEMENT OF FOREIGN OFFICIALS DOES NOT RELIEVE AMERICAN INTERROGATORS FROM COMPLIANCE WITH *EDWARDS v. ARIZONA*.

The initiation of interrogation of a suspect, despite his request to have counsel present during questioning, is a bold violation of the "bright line" rule laid down in *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), where this Court held:

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by a showing that he responded to further police initiated custodial interrogation even if he has been advised of his rights . . . [a]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.

Our government is "entirely a creature of the Constitution," and is bound to respect its limitations whether the government acts at home or abroad. *Reid v. Covert*, 354 U.S. 1, 5-6 (1975). The presence of a third party has not, in military practice, allowed investigators to escape constitutional requirements. *United States v. Holder*, 28 C.M.R. 14 (C.M.A. 1959). American police cannot be allowed to ignore a suspect's request for counsel merely because the request was first made to foreign officials.

The Government and the court below do not contest the fact that if the interrogation of petitioner had taken place in the United States, the "bright line" rule of *Edwards v. Arizona* would have been violated. Instead, the lower court has reiterated a broad exception to the "bright line" rule of *Edwards*, justifying it through speculation as to why a request for counsel is made to foreign officials and through its view of the limited participation of foreign police in the investigation. *United States v. Coleman*, 26 M.J. 451, 453 (C.M.A. 1988).

Petitioner submits that the lower court has sanctioned a rule of law which this Honorable Court rejected in *Arizona v. Roberson*. There, this Court rejected the argument of the United States[1] that a suspect who waives his right to remain silent, following an earlier request for counsel, may have a good reason for doing so. The United States suggested that a suspect in custody might have " 'good reasons for wanting to speak with the police about the offenses involved in the new investigation or at least learn from the police what the new investigation is about so he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel.' " [2] This Court expressly rejected such reasoning, and instead provided the "simple answer" cited above.

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[1] The United States was not a party in *Arizona v. Roberson*, but had filed briefs as *amicus curiae* supporting petitioner.

[2] *See* Arizona v. Roberson, 108 S.Ct. at 2101 (*citing* Brief for United States as *Amicus Curiae* at 11).

II. WHEN A SUSPECT IN CUSTODY MAKES A KNOWING AND INTELLIGENT REQUEST FOR COUNSEL, THE "SIMPLE ANSWER" OF *ARIZONA v. ROBERSON* REQUIRES HIS REQUEST FOR COUNSEL BE HONORED.

Petitioner submits that the "simple answer" is required in the overseas setting. The court below, however, relies on an "overseas exception" to the *Edwards* rule. This exception to *Edwards* was created in *United States v. Vidal*, 23 M.J. 319 (C.M.A.), *cert. denied*, __ U.S. __, 107 S.Ct. 2187 (1987). In *Vidal*, the court below refused to impute to U.S. police the knowledge that a suspect had invoked his right to have counsel present during questioning by foreign investigators. Petitioner does not herein challenge an "overseas exception" where the *imputation of knowledge* between foreign and American officials is involved. However, when American police have *actual knowledge* that a suspect has demanded counsel, no imputation is required, and the "bright line" rule of *Edwards v. Arizona* should apply. Thus, petitioner's case is distinguishable from *Vidal*.

The direct holding in *Vidal* has no application to petitioner's case, and there is no justification for expanding the "overseas exception" to cases where U.S. police have actual knowledge that a suspect has requested counsel. For the reasons expressed by the Court in *Edwards*, the "simple answer" of *Roberson* should be the rule of law, without exception, where police have knowledge of a request to have counsel present during questioning. The incidental fact that petitioner was questioned while overseas should be irrelevant to resolution of whether American law enforcement agents must comply with *Edwards v. Arizona*. Noteworthy, in this case, an American investigator made a telephone call to an American lawyer to ask whether he could question

petitioner. The answer rested entirely upon an interpretation of United States law and the Constitution. Neither the conduct of foreign officials nor foreign laws were implicated. Therefore, involvement of foreign officials in this case is irrelevant to the constitutional analysis.

The court below has relied upon perceived distinctions between the German and American legal systems; however, these distinctions were never explained to petitioner. Furthermore, petitioner was in no position to distinguish between the investigative efforts of German and American police, as he was told it was a "joint" (*i.e.*, cooperative) effort. Under the circumstances, his clear and unambiguous decision to seek counsel should not have been ignored by U.S. officials, and the decision to ignore his request cannot be justified by differences between investigations which did not become apparent until the time of trial.

A reasonable person in petitioner's position would have concluded he was being investigated by American police, or, at least, that they were involved and that he was in jeopardy with regard to U.S. officials in addition to foreign authorities. American investigators were active in combing petitioner's house for evidence. Until questioned by the Germans, all the questions and directions posed to petitioner came from American police. Petititioner was transported to and from the German police station by Americans. The Americans served him lunch at the station, and his interpreter at the station was a U.S. Government employee. The *post hoc* rationalizations asserting that the two investigations were independent only surfaced once the trial began.

When investigators continued to question petitioner in spite of his previous assertion of rights, he could only have concluded that his original request for counsel was

meaningless. Petitioner was faced with the dilemma discussed in *Estelle v. Smith*, 451 U.S. 454 (1981):

> Because a layman may not be aware of the precise scope, the nuances, and the boundaries of his Fifth Amendment privilege, the assertion of that right often depends upon legal advice from someone who is trained and skilled in the subject matter. (citation omitted)

Id. at 471. Once an accused in custody has made the decision to seek counsel and expressed it in unequivocal terms, even if to foreign officials, U.S. investigators who know of the assertion should be prohibited from undermining that decision. As this Court stated, the *Edwards* prohibition prevents police from "persisting in repeated efforts to wear down the accused's resistance and make him change his mind." *Michigan v. Mosley*, 423 U.S. 96, 105-06 (1975).

The court below speculated that petitioner may have been less intimidated by American interrogators, and thus more willing to talk. *See United States v. Coleman*, 26 M.J. at 453. From this the court below seems to imply that petitioner's subsequent waiver of rights was knowing and voluntary. Petitioner submits that this conclusion is unwarranted. It assumes that, once a suspect has asserted his right to counsel, the effect created by having two different investigations can be legitimately used to support a conclusion that he knowingly abandoned his invocation of counsel. However, the court below cannot rely on the difference between the two investigations to assume that petitioner's waiver was unfettered and freely given. *See Connecticut v. Barrett*, __ U.S. __, 107 S.Ct. 828, 831 (1987). Once a suspect has requested counsel, the only correct conclusion that can be drawn from the existence of two in-

vestigations of the same event is that counsel still must be provided. To reiterate what this Court said in *Arizona v. Roberson*, "The simple answer is that the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice."

Further, questioning and solicitation of a rights waiver after the right to counsel has been asserted is expressly prohibited by the "bright line" rule of *Edwards v. Arizona*. Interpreting *Edwards*, this Court condemned similar police tactics in *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam):

> In the absence of such a bright-line prohibition, the authorities, through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.

Id. at 98.

Citing *Arizona v. Roberson*, the court below acknowledged that petitioner's state of mind was important but refused to recognize the subtle effect that changing interrogators could have upon a suspect, especially after the right to counsel had been claimed. *Coleman*, 26 M.J. at 453. The assumption behind this reasoning ignores this Court's explanation of free will and voluntary choice in *Estelle v. Smith*.

III. PETITIONER WAS SUBSTANTIALLY PREJUDICED BY THE ADMISSION OF HIS IMPROPERLY OBTAINED CONFESSION.

There are only two people with certain knowledge as to who killed Theresa Coleman – petitioner and his wife. Petitioner confessed to police, but at trial denied killing

his child. At trial, petitioner's wife admitted to killing the child (R. 146). The only other evidence in the case consists of medical testimony derived from the autopsy.

If the improperly obtained confession had been suppressed, the only significant evidence of record would be petitioner's denial of guilt and his wife's admission. Thus, the confession to police was likely a determinative factor in the conviction. Violation of petitioner's constitutional rights in obtaining that confession, therefore, substantially prejudiced his right to a fair trial.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The question presented is substantial and of constitutional significance. The right to seek counsel is fundamental to the protection of constitutional due process.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 59,522
CM 8600871

UNITED STATES, APPELLEE

v.

RONALD L. COLEMAN,
SPECIALIST FOUR, U.S. ARMY, APPELLANT

September 26, 1988

For Appellant: *Colonel John T. Edwards, Lieutenant Colonel Joel D. Miller, Captain Donald G. Curry, Jr., Captain Alfred H. Novotne.*

For Appellee: *Colonel Norman G. Cooper, Lieutenant Colonel Gary F. Roberson, Major Kathryn F. Forrester, Captain Bryant G. Snee.*

PER CURIAM:

Tried by general court-martial, military judge alone, the accused was convicted, despite his pleas, of murder, as well as aggravated assault and assault and battery on a child, in violation of Articles 118 and 128, Uniform Code of Military Justice, 10 USC §§ 918 and 928, respectively. The adjudged and approved sentence extends to a dishonorable discharge, confinement for 5 years, total forfeitures, and reduction to the lowest en-

listed grade. The Court of Military Review affirmed. 25 M.J. 679 (1987). We granted review of the following issue:

> WHETHER CUSTODIAL INTERROGATION OF APPELLANT VIOLATED *EDWARDS V. ARIZONA* WHEN HIS INTERROGATOR HAD ACTUAL KNOWLEDGE THAT AN ATTORNEY HAD BEEN REQUESTED AND NO ATTORNEY HAD BEEN PROVIDED.

Under the circumstances of this case, we affirm.

The facts, as found by the well-reasoned opinion of the court below, disclose that on July 29, 1986, the Army Criminal Investigation Command (CID) was notified of the death of accused's two and one-half month old daughter on the previous day. The CID notified the German police and arranged to accompany them to the accused's off-base dwelling. At the residence a CID agent and a German policeman looked around the home while the other CID agent talked to the accused. At the time, there was no suspicion of foul play. "The German policeman . . . told" the accused "and his wife to come to the German police station the next morning."

The following day the accused and his wife went to the German police station where they were required to await the results of an autopsy which then was being conducted. At 1:00 p.m. the results, which indicated death by other than natural causes, were disclosed to the accused, and "inconsistencies" in his earlier statements were noted. The accused "declined to answer any further questions and requested an attorney. The interrogation was immediately terminated."

Thereupon, two CID agents drove the accused and his wife to the CID office. There, the CID agent knew that the accused "had refused to make a written statement"

to "the German police and . . . had requested an attorney." The CID contacted a legal officer and, upon his advice, thoroughly advised the accused of his rights under Article 31, UCMJ, 10 USC § 831. Accused waived these rights and gave a "written statement that contained admissions against his penal interest." 25 M.J. at 683.

Both at trial and on appeal appellant has contended that the investigation was "jointly" [1] conducted by the German and American police and, hence, that his request to the German police for legal counsel prohibited further interrogation by the CID, citing *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The "bright line rule" delineated in *Edwards* simply stated, is that once a suspect has indicated his desire to deal with a police interrogator only through his counsel, he may not be interrogated further by authorities until such counsel has been made available unless he, himself, initiates further communications. *See also Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Previously, we have acknowledged application of *Edwards* to the military justice system. *See United States v. Reeves*, 20 M.J. 234 (C.M.A.1985); *United States v. Harris*, 19 M.J. 331 (C.M.A.1985).

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[1] "Jointly" is defined as "in a joint manner; together." *See Webster's New Collegiate Dictionary* 624 (1977). We see a large distinction between an investigation of the same event conducted by two sovereign nations for violations of their own domestic law and an investigation conducted by foreign authorities at the behest of American authorities for the purpose of discovering a violation of American law. Clearly, in the latter situation, a request for counsel made to a foreign investigator acting as an agent for American authorities would trigger a different result.

However, we have also held that there is an "overseas exception" to application of the *Edwards* rule. In *United States v. Vidal*, 23 M.J. 319 (C.M.A.), *cert. denied*, __ U.S. __, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987), we held that the fact that an accused had made a request for counsel to German police authorities did not taint a statement made later to American police where there had been a complete advisement of rights given before the interrogation began. We concluded that the German investigator was conducting an investigation in response to alleged violations of German law and involving a German victim, and we opined:

> Generally, the actions and the knowledge of officials of a foreign nation are not imputed to American authorities in connection with the application of American constitutional guarantees. . . . Although there are obligations of mutual assistance under the NATO Status of Forces Agreement, we have concluded that nonetheless the investigators in the host country cannot be considered as simply an extension of American investigative activity and that admissibility of the evidence seized by them is not to be tested by American constitutional standards. Since the investigation by . . . [the German policeman] should not be viewed as an investigation in behalf of American authorities, we see no reason to impute his knowledge of appellant's request for counsel to . . . [the American police investigator].

23 M.J. at 323 (citations omitted).

Here, of course, the fact of the request for counsel was directly communicated to the American investigator. We do not believe this fact is of decisional significance, however. As we held in *Vidal*:

> [W]e reason that a request for counsel made in connection with a foreign investigation may result only from the American suspect's unfamiliarity with the foreign legal system and does not necessarily mean that the suspect is unwilling to talk to an American investigator until he has been provided counsel. The suspect is adequately protected if he is warned of his rights under American law when first questioned by American officials. In short, we conclude that the requirements of *Edwards v. Arizona*, . . . [*supra*], are not triggered by a request for counsel made to a foreign official.

23 M.J. at 323.

In reaching our conclusion here, we are cognizant of the recent decision of the Supreme Court in *Arizona v. Roberson*, __ U.S. __, 108 S.Ct. 2093, 2098, 100 L.Ed.2d 704 (1988), where the Court, in reemphasizing the "bright line rule" of *Edwards*, held that a request for counsel made to a policeman investigating one crime would carry over to another policeman investigating another crime even without actual knowledge of the first request having passed. The Court

> attach[ed] no significance to the fact that the officer who conducted the second interrogation did not know that respondent [Roberson] had made a request for counsel. In addition to the fact that *Edwards* focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.

Id. at 2101.

We, too, here "focus[ ] on the state of mind of the suspect." As we recognized in *Vidal*, the facts leading an American suspect to request counsel during an interview by German police may be entirely different from those affecting his counsel decision during an American interview. An accused, thus, may be entirely willing to cooperate without counsel in the latter setting, even though the added intimidations in a foreign interview may make him unwilling to do so in the former setting. Because the factors underlying the request for the assistance of counsel are different depending on the authorities conducting the investigation, we do not believe that *Edwards* or *Roberson* requires that a request for counsel made to foreign authorities[2] applies to the initial interrogation by American authorities after such a request.[3]

The decision of the United States Army Court of Military Review is affirmed.

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[2] We acknowledge the similarity of the German "rights advisement" to our own advisement under Article 31. Nonetheless, for the reasons stated in our opinion, the form of the German advisement does not affect our decision here.

[3] We emphasize the necessity of a complete rights advisement prior to the subsequent interrogation.

APPENDIX B

U.S. ARMY COURT OF MILITARY REVIEW

ACMR 8600871

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR RONALD L. COLEMAN,
431-25-0988, UNITED STATES ARMY, APPELLANT

November 30, 1987

For Appellant: Captain Alfred H. Novotne, JAGC (argued), Captain David C. Hoffman, JAGC (on brief).

For Appellee: Captain Bryant G. Snee, JAGC (argued), Colonel Norman G. Cooper, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Major Kathryn F. Forrester, JAGC (on brief).

Before COKER, KENNETT and ROBBLEE, Appellate Military Judges.

OPINION OF THE COURT

COKER, Senior Judge:

Contrary to his pleas, appellant was convicted by a military judge sitting as a general court-martial of the offenses of assault and battery on a child under the age of sixteen, aggravated assault, and murder in violation of Articles 128 and 118, Uniform Code of Military

Justice, 10 U.S.C. §§ 928, 918 (1982) [hereinafter UCMJ]. The victim in each instance was appellant's two and one-half month old daughter. His sentence of a dishonorable discharge, confinement for five years, total forfeitures, and reduction to Private E-1 was approved by the convening authority.

As the child's death occurred in civilian housing in the Federal Republic of Germany, both the German police and the United States Army Criminal Investigation Command [hereinafter CID] conducted an investigation. During the investigation, appellant made an oral admission to the German police and then invoked his rights under German law to make no further statement and to request an attorney. Subsequently, the CID, with full knowledge that appellant had requested an attorney of the German police, interviewed him, secured a waiver of his rights under Article 31, UCMJ, 10 U.S.C. § 831, and obtained a written statement from him. The defense motion to suppress the statement was denied and the statement was admitted into evidence. Appellant argues that the statement was inadmissible for two reasons: first, that the interrogation by the CID was barred by *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) and second, that his request for counsel to the German police was binding upon the CID because the investigation was conducted jointly. We disagree.

The issue of whether a United States agent is bound under *Edwards* by his knowledge that an accused made a request for an attorney to a foreign government official is one of first impression for this court.[1] It involves

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[1] In *United States v. Vidal*, 23 M.J. 319 (C.M.A.) *cert. denied*, __ U.S. __, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987), the Court of Military Appeals stated: "Even if [the CID agent] had been personally

not only the interplay of Fourth and Fifth Amendment rights under the United States Constitution, but also the application of constitutional rights of United States military personnel within the legal system of a foreign, sovereign nation. A factual exposition is necessary for clarity.

The victim had an extensive history of medical problems starting with her premature birth in mid-May 1986. On one occasion in mid-July, the examining physician initially suspected child abuse; however, the appellant provided a satisfactory explanation for the child's injuries and the issue was dropped. The child was dead on arrival at the hospital on the afternoon of 28 July 1986. The autopsy on 30 July revealed two major attacks on the child: nine broken ribs that were old injuries, and skull fracture and head injuries that were the immediate cause of death. In addition, it revealed other minor contusions of varying age. These findings correspond to the charges against appellant: aggravated assault during the period of 27 May to 15 July, assault and battery during the period of 15 July to 19 July, and murder during the period of 25 July to 28 July.

When informed on 29 July of the death, the CID notified the German police and made arrangements with them to go to appellant's home in the local German community later that day. The CID also informed appellant's commander, but made no request for a search

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aware of the request for counsel made to German authorities, we do not believe that this knowledge would have precluded him from questioning Vidal." 23 M.J. at 323. As this belief was not necessary to the decision in that case and was not given as a rule of the case, we consider it *dicta*. While the statement may not be binding precedent, it is persuasive particularly since the following paragraph of the Court's opinion raises some question regarding the possible motive of the German investigation.

authorization. A CID employee served as interpreter. At the home, appellant was told "we needed to talk to him and see the house." He allowed the group into the apartment. One CID agent and the German policeman inspected the home while the second CID agent talked with appellant. No advice or warning under Article 31, UCMJ, was given to him. Appellant indicated his daughter may have hit her head while in a portable, wind-up swing. The agent relayed this information to the German policeman who then seized the swing as evidence, and requested the CID to hold the swing and bring it to the autopsy the following day. The German policeman further told appellant and his wife to come to the German police station the next morning.

The autopsy was performed on 30 July at a U.S. military medical facility. A U.S. military and a German pathologist conducted the procedure together. The cause of death was found to be blunt force injuries to the head, not natural causes. German police and CID personnel were present at the autopsy. Several photographs were taken of the child's body in the swing, to assist in determining if the head injuries could have been caused by the swing's mechanical operation.

At 0900 hours the same day, appellant and his wife were taken to the German police station by a member of his unit. On questioning by the police, they provided only vague information. They were required by the Germans to wait at the station until the autopsy results were available. A member of his unit took lunch to them. At 1300 hours, the German investigator confronted appellant with the autopsy findings and the inconsistencies of his statements. Appellant made an admission against his penal interest, but refused to make a written statement. He then declined to answer any further questions and requested an attorney. The interro-

gation was immediately terminated. Two CID agents picked up the Colemans at 1530 and took them to the CID office. No United States agent was present at the German police station during that day and none participated in any way with the Germans in their handling of appellant and his wife.

At the CID office, the Colemans were provided dinner. A CID agent began interviewing appellant at 1700 hours. The agent knew at that time that appellant had refused to make a written statement for the German police and that he had requested an attorney. Permission for the interview had been obtained from the CID's judge advocate legal advisor. A complete advisement under Article 31, UCMJ, was given to appellant, who waived his rights and made a detailed written statement that contained admissions against his penal interest. He neither made request for nor mentioned an attorney. This is the statement at issue. At a previous time, probably on 29 July, a CID agent referred to the United States/German activity as a "joint investigation." The agent repeated this description at the pretrial investigation (required by Article 32, UCMJ), but refused to categorize it with that term at trial.

Before the trial court, as here, appellant argued that the investigation was "joint" and under United States military control; that the German police were the agents of the CID; and that, therefore, his request for counsel made to the German investigator was binding on the CID, and prohibited the CID from initiating any discussion with or questioning of him. Trial defense counsel objected to the photographs from the autopsy, including those showing the swing, on the bases of cumulativeness and their inflammatory nature. Manual for Courts-Martial, United States, 1984, Mil.R.Evid. 403. Eighteen of thirty-one photographs were excluded as requested.

Defense counsel objected to admission into evidence of the swing as the result of an illegal search and seizure. As the government was not prepared to show the chain of custody on the swing, it withdrew its proffer of the swing as evidence.

Initially, we determine that the line of cases resulting in *United States v. Goodson*, 22 M.J. 22 (C.M.A.1986), are not directly applicable to this case.[2] First we must address the legal status under the Fourth Amendment of the activities at appellant's home on 29 July. Second is the application of *Edwards* and *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986) to foreign government officials. Last is the application of the Fifth Amendment to coordinated police activities of United States and foreign officials.

I.

Based on findings of fact by the trial judge and the stipulation of facts by the parties, we find that the inspection of appellant's home on 29 July 1986 was not a search. An unexplained death of a United States citizen had occurred in a German community. The police officials of both countries were required by their laws and regulations to investigate the death for the purpose of determining its cause. At the time the police officials approached and entered appellant's home, he was not a

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[2] This series of cases addresses the imputation of knowledge that an accused requested counsel from one United States government agent to another. *Goodson* (from military police to CID agent); *United States v. Reeves*, 20 M.J. 234 (C.M.A.1985) (from CID agent to company commander); *United States v. Harris*, 19 M.J. 331 (C.M.A.1985) (from military police to military police).

suspect.[3] The failure of appellant to object to the admission of his statements to the CID at the home is persuasive that the interview was not "custodial interrogation." It further supports the trial judge's determination that appellant was not a suspect. No advice or warning in accordance with Article 31 was given appellant before the interview as none was required. If appellant was not a suspect under the Fifth Amendment, he could hardly have been a suspect under the Fourth Amendment.

Were the activity at appellant's home a search, it would be subject to the constraints of the Fourth Amendment. Mil.R.Evid. 311(c)(1) and (3). We acknowledge the full participation in this police activity by the CID,[4] in addition to the fact that the CID also conducted an investigation of its own. Therefore, the seizure of the swing was subject to Mil.R.Evid. 311 and the Fourth Amendment. *See United States v. Morrison*, 12 M.J. 272 (C.M.A.1982). As the swing was not admitted as evidence in the case, no apparent prejudice or error resulted, even if the seizure was illegal.[5] No objection was made to the use of the swing at the autopsy, nor was any Fourth Amendment objection made to the admission in-

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[3] The facts of record known to the CID that tend to support suspicion of a crime were the unfounded suspicion of child abuse on 19 July, the fact that the child had facial bruises, and the suspicion of a social work services staff member that there might have been child abuse. After hearing the witnesses and studying the parties' trial briefs, the trial judge found that appellant was not a suspect. As his determination is amply supported by the record, we accept that finding.

[4] It matters not whether that participation is categorized as joint, cooperative, or coordinated.

[5] We do not decide the lawfulness of this seizure. For purposes of argument, we will presume that it was unlawful.

to evidence of the photographs of the swing. Therefore, even if the seizure was unlawful, any error regarding the photographs of the swing was waived. Mil.R.Evid. 311(d)(2)(A) and (C); *cf. United States v. Coffin,* 25 M.J. 32, 33-34 (C.M.A.1987) (objection to admission of seized evidence may be made after pleas if good cause shown).

II.

Edwards v. Arizona established that an accused person in custody who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. The right to counsel under the Sixth Amendment was long recognized within the Federal system and was applied to state action under the Fourteenth Amendment. *See Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). *Edwards* recognized the pre-arraignment right to counsel under the Fifth Amendment and its application to state action under the Fourteenth Amendment. The Supreme Court has consistently recognized the importance of counsel under the Fifth and Sixth Amendments, even imposing on police "an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 485, 88 L.Ed.2d 481 (1985). It extended the *Edwards* rule on the right to counsel to apply in post arraignment situations in *Michigan v. Jackson, supra.* The Court of Military Appeals has applied these constitutional protections as well as the protections of Article 31, UCMJ, to United States military actions. *See, e.g., United States v. Applewhite,* 23 M.J. 196, 198 (C.M.A.1987); *United States v.*

Goodson, supra. Yet there are limits in the application of United States constitutional law to its citizens.

In *United States v. Jordan,* 1 M.J. 145 (C.M.A.1975), a rule was enunciated that the Fourth Amendment applied directly to foreign police activities involving United States military personnel. On reconsideration, the rule was modified, *United States v. Jordan,* 1 M.J. 334 (C.M.A.1976), to apply constitutional law to foreign state action only if United States personnel were present or had instigated or contributed to the foreign action. Subsequently, the "mere presence" portion of the rule was deleted by Mil.R.Evid. 311, and its deletion upheld by the court in *Morrison.* The non-application of the Fifth Amendment and Article 31, UCMJ, to foreign police action is analogous. *United States v. Vidal,* 23 M.J. at 323[6]; *United States v. Jones,* 6 M.J. 226 (C.M.A.1979); *see* Mil.R.Evid. 305(h)(2) (rights warnings not prerequisite to admission of statement resulting from interrogation by foreign officials, if interrogation not conducted, instigated, or participated in by United States agents); *United States v. Covington,* 783 F.2d 1052 (9th Cir.) *cert. denied,* __ U.S. __, 107 S.Ct. 117, 93 L.Ed.2d 64 (1986) (exclusionary rules of *Miranda*[7] and *Edwards* not applicable in U.S. courts if statements obtained by foreign officer in foreign country). *Compare* Mil.R.Evid. 311(c)(3) *with* Mil.R.Evid. 305(h)(2). In order to preserve a service member's constitutional rights and protections from United States action, the military courts have established two safeguards. First,

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[6] Interestingly, this decision was appealed to the Supreme Court on the constitutional issue. *Certiorari was denied* __ U.S. __, 107 S.Ct. 2187, 95 L.Ed.2d 843 (1987).

[7] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

the foreign action cannot be conducted, instigated, or participated in, by United States officials. Secondly, the foreign action cannot be used as a subterfuge to circumvent the constitutional protections otherwise afforded an accused. To insure that basic human rights are protected, it is further required that the foreign action in dealing with the service member not result in a statement obtained through coercion, unlawful influence or inducement, Mil.R.Evid. 305(h)(2), nor be shocking to the conscience.[8] *United States v. Jordan*, 1 M.J. at 338.

The rules thus established for our application of constitutional norms in a foreign country conform to the Supremacy Clause.[9] Under existing treaties with the Federal Republic of Germany,[10] the United States is required to assist in carrying out all necessary investigations into offenses involving the United States or members[11] of its force. NATO SOFA, Article VII, para. 6(a).

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[8] In this regard, we find that the German authorities treated appellant appropriately and exerted no unlawful pressure upon him.

[9] This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. See *United States v. Murphy*, 18 M.J. 220 (C.M.A.1984), for a discussion of this Article and the Fifth Amendment's application in a foreign nation.

[10] Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951 (1953) 4 U.S.T. 1793 [hereinafter NATO SOFA].

[11] The record establishes the status of appellant as a member of the force. It does not adequately address the status of his wife and child. Appellant went AWOL from 18 February 1986 to 15 March 1986 to return to the United States and bring his wife back to Germany. She did not enter Germany pursuant to military orders and

The facts of the case before the court demonstrate the need for and the wisdom of the rules, the Treaty, and the Constitution. Mrs. Coleman and her daughter (the victim) were United States citizens living in a German community, in an apartment owned by a German citizen, and leased to her husband (appellant). Any criminal offense she committed would be subject exclusively to German jurisdiction.[12] Any crime committed in the home would be subject to German jurisdiction, although if committed by appellant, the United States would have concurrent jurisdiction. If the victim of appellant's offense was not a member of the force, Germany had the primary right to exercise jurisdiction; otherwise the United States had such primary right. On the morning of 29 July, there was no evidence that an offense had been committed. Subsequent to the autopsy on 30 July, it was known that an offense probably had been committed. It was not known at that time, prior to the CID interview of appellant and prior to his admission to the German police, *who* had committed the offense: Mrs. Coleman under German jurisdiction, or appellant under probable United States jurisdiction.

Clearly, the police agents of both nations were obligated under their own laws to investigate the victim's death. The two nations were obligated to each other by treaty to assist one another in this investigation. Yet the laws, rules, and restrictions of the two nations, for

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probably was not, therefore, a member of the force. If not a member of the force, she was not entitled to any of the benefits of the Treaty, nor would she have any constitutional protections from German state actions. However, it appears that both police agencies treated her as a member of the force.

[12] Even if she were a member of the force, she was not subject to United States criminal jurisdiction. *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957).

pretrial investigations and the trial of an accused, vary markedly. Each police agency was charged to investigate and prepare a case, *in accordance with its own law.* No more could the German police direct United States police action, and jeopardize the trial of appellant, than could the CID jeopardize the trial of Mrs. Coleman. Only by interactive, cooperative assistance could both police agencies fulfill their legal obligations to their nation and to the potential accused. This objective is precisely the goal of the rules in recognizing the obligations of a foreign legal system, of the Treaty in requiring and committing to mutual assistance, and of the Constitution in mandating the supremacy of treaty commitments. We conclude that the United States Constitution and court decisions interpreting it do not apply to the actions of foreign police officials.

III.

In reviewing United States police action in assisting foreign police officials, performed in observance of United States treaties and law, we do not disregard our constitutional norms. Rather, we will closely analyze any cooperative activity to distinguish the actions of United States officials from those of foreign officials, and apply our norms and law to any and all United States action.[13] We have previously determined that the activity of investigation at appellant's home was a United States action and applied our norms and law to that activity. In reviewing the activity at the German police station on 30 July, we find no United States action. Appellant's unit provided transportation to the station and a lunch for appellant and his wife while there.

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[13] Such scrutiny of United States action is also applied in federal courts. *United States v. Covington,* 783 F.2d at 1056.

This was at most a cooperative act by the United States in response to a cooperative act by the German officials in allowing the Colemans to remain at home and "come" to the station rather than "arresting" and "taking" them to the station. We note that appellant himself had no means of transportation. The CID correctly picked him up from the station, as by that time, he was suspected of a serious offense. There is no evidence that any United States official instigated the German interrogation of appellant. There is ample evidence that the CID did not participate in or conduct any part of that interrogation. There is no evidence that any United States official performed any action that could be considered a subterfuge for obtaining a statement from appellant or his wife. Given these facts, there can be no other conclusion than that the activity at the German police station was solely German action to which United States law did not apply. As our law did not apply to the German action, the rule of *Edwards* had no trigger and could not attach to appellant's request for counsel made to the German police.

To apply any other rule, and not the *dicta* of *Vidal*, would be contrary to the purpose of the *Edwards* rule. As cautioned by the Supreme Court, "one set of state actors may not claim ignorance of . . . another state action." *Michigan v. Jackson*, 106 S.Ct. at 1410. *Edwards* imposes a "bright-line" standard as a prophylactic rule to control police misconduct. Attaching the *Edwards* rule to a request for counsel made to foreign officials would not hinder such misconduct. Rather, it would invite "ignorance" by our police officials, and encourage subterfuge to insure that ignorance. The only methods available to United States officials to insure that there is no violation of the Fifth Amendment and the *Edwards* rule are not to permit foreign officials to interro-

gate a military accused or to permit the foreign government to dispose of all offenses by military personnel. The first alternative would be a direct affront to the sovereignty of the foreign nation as well as a violation of a United States treaty. The second would be contrary to the same treaty as well as the explicit direction of the United States Congress.

In conclusion, we find that the *Edwards* rule is not triggered by an invocation of the right to counsel before foreign officials in a foreign investigation. Moreover, we find that the German interrogation of appellant, the only part of the investigation pertinent to the issues raised, was in no way "conducted, instigated, or participated in" by the CID, and thus, was solely German action, to which our law does not apply.

The findings of guilty and the sentence are affirmed.

Judge KENNETT and Judge ROBBLEE concur.

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No. 88-824

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

RONALD L. COLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether American police officers could lawfully question a suspect about a crime after the suspect had asked foreign police officers, who were investigating a violation of foreign law, for permission to speak with counsel.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-6a) is reported at 26 M.J. 451. The opinion of the Court of Military Review (Pet. App. 7a-20a) is reported at 25 M.J. 679.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 26, 1988. The petition for a writ of certiorari was filed on November 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Kaiserslautern, West Germany. He was convicted of murder, aggravated assault,

and assault and battery, in violation of Articles 118, 128(a), and 128(b) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 928(a), and 928(b). He was sentenced to five years' imprisonment, a dishonorable discharge, total forfeiture of pay, and a reduction in rank. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Upon discretionary review, the Court of Military Appeals affirmed.

1. On July 28, 1986, petitioner's two and one-half month old daughter Teresa died while in the care of petitioner and his wife at petitioner's apartment in Misenbach, West Germany. The autopsy revealed that Teresa died of blunt force injuries to her head, causing a skull fracture, associated hemorrhages, and brain swelling. Tr. 285. The autopsy also revealed several older injuries including nine broken ribs and internal head injuries. Tr. 285-289; GX 32. A forensic pathologist testified that Teresa received at least four blunt force blows to her head within 24 hours of her death. Tr. 284-285, 290, 300. A "significant" amount of force was required to cause the fatal head injuries. Tr. 287. The pathologist also stated that Teresa's broken ribs could not have been caused by "hugging the baby." Tr. 299. A baby's ribs are very resilient, he said, and a "massive" or "tremendous amount of force" would be required to fracture them by squeezing the child. *Ibid.*

2. The death occurred in a German community, and the German police began an investigation on July 29, 1986.[1] Pursuant to a regulatory requirement to investi-

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[1] Under applicable law the Federal Republic of Germany had jurisdiction over the offense regardless of who committed it. Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, art. VII, §§ 2-3, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67. The United States had concur-

gate "unattended deaths" (*i.e.*, deaths that occur without a physician present) the Army's Criminal Investigation Division (CID) also began its own separate investigation. Tr. 30, 35, 39, 44, 46, 51. A German policeman told petitioner and his wife that they were required to come to the German police station the next day for an interview. Tr. 30. The next morning, a sergeant from petitioner's unit drove petitioner and his wife to the German police station. AX 10, at 1; Tr. 42. Prior to the autopsy, a German police officer informed petitioner of his rights under German law to remain silent and to consult a lawyer before or during questioning. Tr. 21-22; AX 11. Petitioner indicated on a German form that he did not want to make a statement and added "at this time" in his own handwriting. Petitioner also indicated that he wanted to consult a lawyer. Tr. 21-22; AX 41. Later that day, after being confronted with the autopsy results by the German Chief Prosecutor, petitioner explained that he had dropped his daughter as he was feeding her, but he declined to put that statement in writing. Tr. 24-27, 263-265; AX 10. The Germans did not attempt to question petitioner further. Tr. 24. There were no American personnel present during any part of the interview of petitioner by the German authorities, and the interview was not conducted at the behest of the CID. *Ibid.*; Pet. App. 11a.

Shortly thereafter, two Army CID agents transported petitioner and his wife to the CID office in order to take a statement from them about the death of their child. Tr. 32, 41, 43, 46, 59; AX 10, at 1. Special Agent Joseph Herron was aware that petitioner had requested an attorney at the German police station. Another agent had

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rent jurisdiction and the primary right to prosecute once it was determined that petitioner, a United States serviceman, was to be charged with committing the offense. *Ibid.*

been advised by an American attorney that petitioner could be questioned, but only after he was advised of his rights under United States law. Tr. 64, 77-78, 81, 85; AX 10, at 1. Special Agent Herron fully advised petitioner of his rights under Article 31(b) of the UCMJ, 10 U.S.C. 831(b), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner waived those rights "[w]ithout hesitation" (Tr. 70) and executed a standard waiver of rights form. AX 12. Petitioner initially stated that Teresa hit her head against the supporting legs of a mechanical swing. Tr. 62-64. After being told that his story was implausible, petitioner changed his account. In a sworn statement, petitioner admitted "slapping" his infant daughter in the head "two or three times" because she was ill, and "squeezing and shaking" Teresa "[m]aybe three or four times" because she would not eat. GX 34, at 1, 2. Petitioner also said that he might have struck his daughter with his fist. *Id.* at 3.

3. At trial, petitioner moved to suppress his statement. Petitioner alleged, among other things, that his waiver was invalid. Petitioner argued that his request to the German police for counsel should be treated the same as a request to American police, and that Agent Herron therefore violated *Edwards* v. *Arizona*, 451 U.S. 477 (1981), when he subsequently questioned petitioner. AX 8. Petitioner did not testify on the motion or present evidence. Tr. 86.[2] After a full evidentiary hearing, the trial judge denied the motion. Tr. 100-102. The trial judge found that petitioner's request for counsel, made to German authorities investigating a violation of German law, did not preclude his interrogation by American authorities investigating a

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[2] Petitioner elected not to testify on the motion even though under Mil. R. Evid. 301(e) he could have limited his testimony (and cross-examination) to the issue of his waiver.

violation of American law. Tr. 101. At trial, petitioner testified and recanted his confession. Tr. 305. He claimed that he had lied in his sworn statement in order to protect his wife. Tr. 306.[3]

4. The Army Court of Military Review affirmed. Pet. App. 7a-20a. It found no evidence of any involvement by American authorities in petitioner's interrogation at the German police station.[4] The court held that American law did not apply to independent actions by German authorities, and that the rule of *Edwards* v. *Arizona*, *supra*, was not triggered by petitioner's request for counsel made to the German police. Pet. App. 19a.

5. The Court of Military Appeals affirmed. Pet. App. 1a-6a. It observed that the rule adopted in *Edwards* and

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[3] Petitioner's wife testified that she had caused her daughter's death by slapping her several times on the head three days earlier, on July 25, 1986. Tr. 146-147, 152-154. The forensic pathologist testified, however, that the injuries that killed Teresa Coleman were sustained within 24 hours of her death. Tr. 277-278, 284-285. He concluded "with reasonable medical certainty" that Mrs. Coleman's assault on her daughter—if it occurred as she described it—could not have caused her daughter's death. Tr. 290.

[4] The court of military review stated that the result would be different if the actions of the German police had been "conducted, instigated, or participated in, by United States officials [or] * * * used as a subterfuge to circumvent the constitutional protections otherwise afforded an accused." Pet. App. 16a. The Court of Military Appeals made the same observation. *Id.* at 3a n.1. That test is applied by both civilian and military courts. See, *e.g.*, *United States* v. *Mundt*, 508 F.2d 904, 906 (10th Cir. 1974), cert. denied, 421 U.S. 949 (1975) (*Miranda* warnings are not essential to the validity of a confession given in a foreign country unless foreign officials acted as agents of United States officials); *United States* v. *Jones*, 6 M.J. 226 (C.M.A. 1979) (whether foreign police must warn a suspect of his *Miranda* rights prior to interrogation turns on whether the foreign police are acting as instrumentalities of military authorities). The *Jones* rule is codified in Mil. R. Evid. 305(h)(2).

applied in *Arizona* v. *Roberson*, No. 87-354 (June 15, 1988), focuses on the state of mind of the suspect, and that "the facts leading an American suspect to request counsel during an interview by German police may be entirely different from those affecting his decision during an American interview." Pet. App. 6a. The court declined to extend *Edwards* to petitioner's situation, but emphasized the "necessity of a complete rights advisement" by American authorities following a request for counsel made to foreign authorities. *Id.* at 6a n.3.

ARGUMENT

Petitioner contends that his request for counsel to a German police officer investigating a violation of German law triggered the rule of *Edwards* v. *Arizona* and precluded later questioning by American authorities investigating a violation of American law. All three courts below properly rejected that claim. As those courts correctly recognized, there is an important difference between the case of a suspect who has invoked his right to counsel under American law while in the custody of American police, and that of a suspect who has invoked a right to counsel under foreign law while in the custody of foreign police. In the latter situation, the suspect has not triggered the *Edwards* rule, because there has been no custodial interrogation by officials to whom the Fifth Amendment is applicable.

In *Miranda* v. *Arizona*, 384 U.S. 436, 439 (1966), this Court addressed the "admissibility of statements obtained from an individual who is subjected to custodial interrogation." The Court devised a prophylactic rule designed to protect a suspect's Fifth Amendment privilege against compulsory self-incrimination from the inherent coercion present during custodial interrogation by assuring that

"the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." 384 U.S. at 469. One of the requirements of the *Miranda* rule is that prior to interrogating a suspect in custody, a law enforcement officer must inform him that he has the right to an attorney. *Id.* at 444. The Court added that if the suspect requests counsel, "the interrogation must cease until an attorney is present." *Id.* at 474.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created an additional prophylactic rule to deal with cases in which a suspect in custody makes a request for counsel after receiving *Miranda* warnings. In *Edwards*, the suspect was arrested and submitted to questioning following *Miranda* warnings, but later stated that he wished to consult with an attorney. The police renewed their questioning the following day while the suspect remained in police custody. The resulting confession was held inadmissible on the ground that the suspect had not effectively waived his previously invoked right to counsel. This Court held that when a suspect in custody asks to speak with a lawyer, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485. The new rule, the Court explained, was justified by the concern that "[i]n the absence of such a bright-line prohibition, the authorities through 'badger[ing]' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984).

Recently, in *Arizona* v. *Roberson*, No. 87-354 (June 15, 1988), this Court extended the *Edwards* rule to police-initiated interrogations following an arrested suspect's

request for counsel in the course of a separate investigation. In *Roberson*, the suspect invoked his right to counsel after receiving *Miranda* warnings. Later, while he remained in custody, the suspect waived his right to counsel and responded to police-initiated questions about different crimes. Emphasizing the virtue of a bright-line rule (*Roberson*, slip op. 5), the Court held that *Edwards* barred the second interrogation even though the interrogators did not know that Roberson had previously asked to speak with a lawyer. In response to the argument that a suspect might have a good reason for wanting to speak with the police about the crimes involved in the new investigation, the Court stated that the "simple answer is that the suspect, having requested counsel, can determine how to deal with the separate investigations with counsel's advice." *Roberson*, slip op. 10.

Petitioner argues (Pet. 4, 7) that that same "simple answer" applies to his case, invalidates his waiver, and bars the use of his admissions against him. Petitioner's argument, however, ignores the critical distinction between this case and *Roberson*. In *Roberson*, as in every case in which this Court has applied the *Edwards* rule,[5] the suspect was in the custody of American officials throughout and had invoked his right to counsel under American law. By contrast, petitioner was not in the custody of American officials when he requested counsel, nor was he questioned by American officials while he was in the custody of the German police. The Army CID officers therefore did not violate the *Edwards* rule by questioning petitioner at CID headquarters, because that rule

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[5] See *Connecticut* v. *Barrett*, 479 U.S. 523 (1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); *Solem* v. *Stumes*, 465 U.S. 638 (1984); *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983); *Wyrick* v. *Fields*, 459 U.S. 42 (1982).

was not triggered when petitioner asked the German police for permission to speak with a lawyer.

The Fifth and Fourteenth Amendments prohibit federal and state officers from compelling a person to be a witness against himself in a criminal case, but those Amendments do not apply to the actions of foreign law enforcement officers, as the military courts correctly recognized. Pet. App. 4a, 15a-18a.[6] Just as the Fifth Amendment does not apply to the actions of a private party because there is no state action involved, the Fifth Amendment likewise does not apply to the actions of a foreign law enforcement officer, since his actions, although governmental, do not consitute the kind of "state action" to which our Constitution applies. For these reasons, the courts of appeals have uniformly held that the *Miranda* and *Edwards* rules do not apply to questioning by foreign law enforcement officers in a foreign land unless American law enforcement officers have participated significantly in that investigation.[7]

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[6] As the Ninth Circuit explained in *United States* v. *Covington*, 783 F.2d 1052, 1056-1057 (1985), cert. denied, 479 U.S. 831 (1986) (citation omitted): "*Miranda* was, and remains a prophylactic device designed to protect the exercise of Fifth Amendment rights by criminal defendants. When there has been no compulsion by a state or federal agent, either directly or by significant participation by such an agent, then the constitutional mandate has not been violated. Therefore, when a law enforcement officer of a foreign country does not follow the requisites of *Miranda* and *Edwards*, the fifth amendment right against self-incrimination has not been violated and there is no requirement for invocation of the exclusionary rule."

[7] See, *e.g.*, *United States* v. *Martindale*, 790 F.2d 1129, 1131-1132 (4th Cir.), cert. denied, 479 U.S. 855 (1986) (absent a showing that American authorities sought to evade constitutional requirements by employing foreign authorities, or a showing of coercion, statements made by an American suspect to British authorities were admissible); *United States* v. *Covington*, 783 F.2d at 1055-1056 (the *Edwards* rule was not triggered when foreign police ignored a suspect's request for

In this case, petitioner was not "taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda*, 384 U.S. at 444 (footnote omitted)) by American officials at the German police station.[8] Both military appellate courts rejected petitioner's contention that the German police officers should be treated as agents of the Army CID when they questioned petitioner because the two nations were conducting a "joint" investigation. Pet. App. 3a n.1, 18a-20a. See *United States* v. *Bagaric*,

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counsel and obtained his confession); *United States* v. *Nolan*, 551 F.2d 266, 273 (10th Cir.), cert. denied, 434 U.S. 904 (1977); *Kilday* v. *United States*, 481 F.2d 655 (5th Cir. 1973); *United States* v. *Trenary*, 473 F.2d 680, 681-682 (9th Cir. 1973); *United States* v. *Welch*, 455 F.2d 211 (2d Cir. 1972); *United States* v. *Chavarria*, 443 F.2d 904, 905 (9th Cir. 1971); *United States* v. *Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970), cert. denied, 401 U.S. 939 (1971); *United States* v. *Vidal*, 23 M.J. 319 (C.M.A. 1987), cert. denied, No. 86-1699 (May 18, 1987) (a suspect's request for counsel made to foreign police does not trigger the *Edwards* rule and therefore does not invalidate a subsequent waiver of the suspect's *Miranda* rights when he is questioned by American officials); *United States* v. *Jones*, 6 M.J. 226 (C.M.A. 1979) (*Miranda* warnings are not essential to the validity of a confession given to foreign authorities).

Those decisions also highlight an anomaly in petitioner's argument. Under those decisions, if the German police had never informed petitioner that he had the right to speak with a lawyer, or had ignored petitioner's request for an attorney, and obtained a statement from him, that statement would not have been inadmissible under *Miranda*. If so, it is irrational to exclude petitioner's statements because the German police respected petitioner's request to see a lawyer and did not question him further.

[8] Indeed, it appears that petitioner was also not in custody at the time he was questioned by American officials at the CID office. If he was not in custody at that time, the principles of *Edwards* and *Roberson* are inapplicable on that ground as well. The courts below did not address the issue of custody, but instead appeared to assume that petitioner was in custody at the time he made his sworn statement.

706 F.2d 42, 69 (2d Cir.), cert. denied, 464 U.S. 840 (1983) (whether American law enforcement officers are engaged in a joint law enforcement endeavor with foreign officials is a question of fact). As the court of military review noted, "[n]o United States agent was present at the German police station during that day and none participated in any way with the Germans in their handling of [petitioner] and his wife." Pet. App. 11a.[9] Accordingly, petitioner's request for counsel to the Germans came before the point at which the *Miranda* and *Edwards* safeguards apply, *i.e.*, custody by American officials.

Contrary to petitioner's contention, the policies underlying this Court's decisions in *Edwards* and *Roberson* do not compel exclusion of the statements petitioner made to the CID officers in this case. Unlike in *Edwards*, there was no "badgering" of the suspect to abandon his request for counsel. The request had been made to officers of an entirely different nation who were conducting an independent investigation. And the CID officers gave petitioner complete *Miranda* warnings, so he was aware that if he wanted counsel before questioning by the American officials, all he had to do was ask. Unlike in *Roberson*, peti-

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[9] Petitioner has not renewed his claim that the German authorities should be treated as agents of the Army CID. Petitioner does, however, place a great deal of emphasis on what he terms the " 'joint' (*i.e.*, cooperative) effort" (Pet. 8) of the German and American police. He cites this supposed "cooperation" as support for his assertion (Pet. 8-9) that he "could only have concluded that his original request for counsel [made to the Germans] was meaningless," because he believed that the two nations had pooled their efforts. The short and complete answer to that claim is that petitioner has waived it by failing to testify about his state of mind and the voluntariness of his waiver. Petitioner's argument before this Court must stand or fall on whether *Edwards* applies to his case, and not on petitioner's belated assertions about his perception of the events leading up to his confession.

tioner would not likely have concluded that the failure to receive counsel when he asked the German police for permission to see a lawyer meant that any request he made to the American authorities would be futile. When the interrogation is conducted by officers of a different nation, a suspect would be expected to conclude that the interrogating officers meant just what they said: if the suspect wanted counsel before questioning, counsel would be provided. For that reason, the concerns that the Court expressed in *Edwards* and *Roberson* simply do not apply in a setting such as this one, where American officers question a suspect after he has been questioned by—and has requested counsel of—foreign law enforcement authorities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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